## Office of Chief Counsel Internal Revenue Service

# memorandum

CC: WR: PNW: SEA: TL-N-6168-99

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Date:

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To:

District Director, Seattle

Attn: Barbara Knight, Group Manager MS W135

From:

District Counsel, Seattle MS 670

Subject: Request for Advisory Opinion

Taxpayer:

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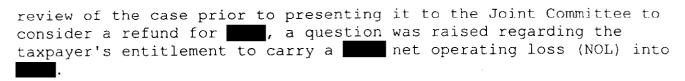
This refers to your request of October 13, 1999, for our advice in the above-entitled case.

### **ISSUE**

The issue is whether I.R.C. §§ 1311 through 1314 apply in this case to mitigate the effect of the statute of limitations on a refund for the taxable year \_\_\_\_\_.

#### FACTUAL BACKGROUND

As we understand this case, based on a discussion with the revenue agent and a reading of the submission of the taxpayer's counsel, is a holding company for a number of corporations in the family of corporations. During a



According to the taxpayer, reported a substantial loss when it filed its return for . At that time the taxpayer inadvertently failed to file an election under I.R.C. § 172(b)(3) to relinquish the carryback period and instead to carry the loss forward. When the return was filed, it showed the entire amount of the NOL as a carry forward deduction on such return.

The Service examined the returns for and and reduced the NOL. However, the Service did not adjust the income by carrying the NOL back to (No carryback to and was available because both of those returns showed losses.)

In the taxpayer filed Form 1120X for to reflect the results of the audit adjustments for and including the Service's reduction of the NOL and various other adjustments to the return.

On the carryback of the NOL to On the Service sent the taxpayer the initial version of the Joint Committee spreadsheet indicating that the NOL must be carried back to before it could be carried forward to On the Service sent the taxpayer a revised Joint Committee spreadsheet indicating that the NOL that was disallowed as a carryover to

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#### LEGAL DISCUSSION

Our initial inquiry centered on the applicability of Treas.

Reg. §§ 301.9100-1 through 301.9100-3 [relating to extensions of time to make elections] to the election that the taxpayer should have made with its return to carry the NOL forward to instead of back to We were informed by the Chief Counsel's office that relief under the aforementioned regulations would be granted only if the election under § 172(b)(3) were made within six months of the due date. Therefore, such relief is not available in this case.

We then considered the mitigation provisions as they may apply to this case. The first requirement is that there must be a circumstance described in § 1312 in order for mitigation to come into play. In this case, the circumstance would be a double disallowance of a deduction (the NOL deduction being disallowed in both and This circumstance is described in § 1312(4).

However, the circumstance requires a "determination" as defined in § 1313(a). It does not appear that there has been a determination yet, but there will be a determination under § 1313(a)(3)(B) at such time that there is a final disposition by the Service of the taxpayer's claim for refund for the claim based on the requirement that

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the NOL be carried back to first.)

Once there is a determination for \_\_\_\_\_, the provisions of § 1312(b)(2)(B) come into play. It provides as follows:

"In the case of a determination described in section 1312(4) (relating to disallowance of certain deductions and credits), adjustment shall be made under this part only if credit or refund of the overpayment attributable to the deduction or credit described in such section which should have been allowed to the taxpayer or related taxpayer was not barred, by any law or rule of law, at the time the taxpayer first maintained before the Secretary or before the Tax Court, in writing, that he was entitled to such deduction or credit for the taxable year to which the determination relates."

Applying this provision to the instant case, it must be determined that the overpayment resulting from the NOL deduction was not barred at the time that the taxpayer first maintained before the Service in writing that it was entitled to the NOL deduction in As we understand the instant case, the taxpayer maintained in writing in on its Form 1120X for that it was entitled to deduct the NOL on its return. The statute of limitations did not bar the overpayment until well after the filing of the Form 1120X.

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### CONCLUSION

Thus, the required conditions appear to exist for application of the mitigation provisions. Under § 1311(a), "the error [in this case, the double disallowance of the NOL deduction] shall be corrected by an adjustment made in the amount and in the manner specified in section 1314."

If you need any further assistance in this case, please do not hesitate to call on us. We are closing our file subject to reopening if the need arises. If you have any questions regarding this matter, please contact the undersigned at (206) 220-5951.

(SICHED) THOMAS N. TOMASHER

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Special Litigation Assistant

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